Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996	))	CC Docket No. 97-11

NOTICE OF PROPOSED RULEMAKING

Adopted: January 9, 1997 Released: January 13, 1997

Comment Date: February 24, 1997
Reply Comment Date: March 17, 1997

By the Commission:

Table of Contents

I. INTRODUCTION AND BACKGROUND

1. Section 214 of the Communications Act of 1934, as amended, imposes regulatory obligations on common carriers seeking to change their facilities or construct new facilities. Section 214 states that "[n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line."[1] Congress enacted Section 214 to prevent useless duplication of facilities that could result in increased rates being imposed on captive telephone ratepayers.[2]

2. On February 8, 1996, the Telecommunications Act of 1996[3] was signed into law to "establish a pro-competitive, de-regulatory national policy" framework for the United States telecommunications industry. As part of this comprehensive legislation, Congress adopted Section 402(b)(2)(A) of the 1996 Act. This provision states that, "[t]he Commission shall permit any common carrier to be exempt from the requirements of Section 214 of the Communications Act of 1934 for the extension of any line . . . ." Under this exemption, carriers seeking to extend their lines of communication no longer need to seek Commission authorization for their proposals under Section 214 or our Part 63 rules.[4] Accordingly, we have initiated this rulemaking proceeding: (1) to implement Section 402(b)(2)(A) of the 1996 Act; and (2) to determine the extent to which the Commission should exercise its remaining Section 214 authority in light of the forbearance provisions of the 1996 Act.[5]

II. ISSUES

A. Overview

3. Section 402(b)(2)(A) exempts common carriers from the requirements of Section 214 "for the extension of any line." Accordingly, although they must continue to obtain appropriate authorization for the use of radio frequencies under Title III of the

---

[1] 47 U.S.C. § 214 (hereinafter, "Section 214").

[2] 78 *Cong. Rec.* 10314 (1934) (Remarks of Rep. Rayburn).

[3] Pub. L. No. 104-104, 110 Stat. 56 (1996) (hereinafter, the "1996 Act").

[4] 47 C.F.R. Part 63.

[5] 47 U.S.C. § 160.

Communications Act of 1934, carriers are free to construct, acquire, operate, or transmit over the "extension" of a line without receiving Section 214 or Part 63 approval. In this notice, we seek comment on the scope of this statutory exemption and, in particular, on how "extension of any line" should be defined. As discussed below, we tentatively conclude that an "extension of a line" is a line that allows the carrier to expand its service into a geographic territory that it is eligible to serve, but that its network does not currently reach. We also propose to forbear, under Section 401 of the 1996 Act,[6] from exercising Section 214 authority over "new" lines with respect to local exchange carriers ("LECs") subject to price cap regulation, LECs that are considered average schedule companies, and domestic carriers deemed non-dominant, whether they are offering local or domestic, long distance services. In addition, we propose to grant Section 214 blanket authority for small projects undertaken by carriers to construct new lines.[7] We also seek comment on other alternatives: namely (1) whether we should treat price cap LECs which have elected a "no-sharing" X-factor differently from other price-cap LECs; and (2) whether we should forbear altogether from applying Section 214 to small carriers.

1. Statutory Authority and Construction

4. Section 214 defines a "line" as "any channel of communication established by the use of appropriate equipment, other than a channel of communications established by the interconnection of two or more existing channels."[8] Section 214 identifies two broad categories of lines. A carrier may construct a "new line" or it may construct an "extension" of a line. Similarly, a carrier may acquire or operate a "line" or an "extension thereof," and may transmit over "such additional . . . line" or "extended line." Section 402(b)(2)(A) exempts carriers from the requirements of Section 214 with respect to the "extension of any line." Accordingly, the exemption created by Congress in 402(b)(2)(A) applies to some, not all, of the carrier activities otherwise subject to Section 214 certification.[9]

2. Definitional Issues

5. Although the text of Section 214 identifies discrete categories of transactions subject to Section 214 certification, historically, the certification process, standards, and requirements applicable to all such transactions have been identical. As a result, neither

---

[6] 47 U.S.C. § 160.

[7] As discussed below, we propose to provide blanket authority for projects that, in the aggregate, either (1) have a total annual cost of no more than $12,000,000 or an annual rental of no more than $3,000,000; or (2) increase the total book value of the carrier's lines by not more than 10%. *See* paragraph 62, *infra*.

[8] 47 U.S.C. § 214(a).

[9] *See Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-29 (1947).

courts nor the Commission has had a need to provide specific definitions of these categories or to distinguish among them.[10] The language of Section 402(b)(2)(A), however, requires that we now define the "extension of any line" and distinguish such an extension from "new lines," which are not exempted from the requirements of Section 214.

6. In developing a definition of "extension of any line," we believe that appropriate guidance should be drawn from three sources: (a) the meaning of the words, "extension" and "new;" (b) Congress's original purposes in enacting Section 214 of the 1934 Act and Section 402(b)(2)(A) of the 1996 Act; and (c) court and Commission precedent interpreting the text of Section 214 and Section 1(18-22) of the Interstate Commerce Act, from which Section 214 was derived.

7. *(a) Definitions of "Extension" and "New."* Webster's dictionary defines "extension" as, *inter alia*, "the act of extending or state of being extended" or "an addition to a main structure."[11] The verb "extend" means "to expand the area or scope of" or "to increase the influence of."[12] By contrast, the word "new" is defined as "having existed or been made for only a short time," "unfamiliar," "novel," or "recently arrived or established in a position, place or relationship."[13]

8. Thus, the phrase "extension of a line" implies that, to extend its lines, a carrier should add to its network by beginning to serve new territory, thereby expanding its area of service. As distinguished from an extension, a "new line" suggests one which, independent of location, has recently been created or is in some other way "novel."

9. *(b) Legislative Intent.* Section 214 was originally enacted to prevent a monopoly carrier from engaging in "useless duplication of facilities, with consequently higher charges upon the users of the service."[14] The stated legislative purpose of the 1996 Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new

---

[10] *E.g., General Tel. Co. of California v. F.C.C.*, 413 F.2d 390, 402 (D.C. Cir. 1969) (affirming Commission holding that channel service facilities constructed by common carrier constituted "lines" subject to regulation under 214(a) without distinguishing whether these lines were "new" lines or "extensions"), *cert. denied*, 396 U.S. 888 (1969); *American Tel. and Tel. Co.*, 10 F.C.C. 315, 320 (1944) (concluding that channels of communication, which were created by new technology expanding the capacity of existing wires, constituted "lines" within the meaning of Section 214. The Commission did not state whether it considered these lines "new" or "extended").

[11] *Webster's II New Riverside University Dictionary*, Riverside Publishing Co., at 456 (1994).

[12] *Id.*

[13] *Id.* at 792.

[14] 78 *Cong. Rec.* 10314 (1934) (Remarks of Rep. Rayburn) (emphasis added).

telecommunications technologies."[15] Consistent with this broad purpose, Congress enacted Section 402(b)(2)(A), intending to "eliminate[] the Section 214 approval requirement for extension of lines."[16] In this proceeding, we seek to give effect to the de-regulatory letter and spirit of the 1996 Act in general, and Section 402(b)(2)(A) specifically, thereby promoting competition by removing outdated barriers to entry in telecommunications markets.

10. *(c) Precedent.* In expanding their own networks, carriers generally undertake one of two basic types of activities. They may either (1) expand the geographic area covered by their facilities; or (2) increase the capabilities of their network within their existing service area. Each type of activity has implications with respect to the definition of the "extension" of a line.

11. *(1) Geographic Considerations.* Congress patterned Section 214 on Section 1(18-22) of the Interstate Commerce Act.[17] In interpreting that provision, the Supreme Court defined "extensions" as lines "the purpose and effect [of which] is to extend substantially the line of a carrier into new territory."[18] Two 1938 Commission decisions generally followed the Supreme Court's "new territory" language in the communications context, and instruct our efforts to distinguish "new" lines from "extensions."[19] That year, the Commission used the term "extension" to describe the acquisition of telegraph lines to serve "new territory not theretofore served" by the acquiring carrier.[20] In another opinion issued the same day, the Commission used the term "new, additional or supplemental facilities" to describe lines constructed by Southwestern Bell within its service area in Texas.[21]

12. Other decisions, however, cloud the Commission's 1938 definition. Since that

---

[15] 110 Stat. at 56.

[16] *Joint Statement of Managers,* S. Conf. Rept. No. 104-230, 104th Cong., 2nd Sess. (1996), at 69.

[17] The provisions of Section 1(18-22) of the Interstate Commerce Act were enacted as part of Section 402 of the Transportation Act of 1920, 41 Stat. 456, 477-78 (1920). The relevant portion is now codified at 49 U.S.C. § 10901.

[18] *Texas & P. Ry. Co. v. Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266, 278 (1926).

[19] *See Mackay Radio and Tel. Co.*, 6 F.C.C. 562, 574 (1938); *Southwestern Bell Tel. Co.*, 6 F.C.C. 529, 532 (1938).

[20] *Mackay Radio and Tel. Co.*, 6 F.C.C. at 574. Mackay had acquired from Postal Telegraph-Cable Co. a telegraph line between Washington, D.C., and Baltimore, Maryland. Although Mackay served Washington, D.C., it had no facilities or service to Baltimore prior to the transaction at issue in the opinion. 6 F.C.C. at 565. The Commission termed Mackay's initiation of service to Baltimore an "extension." 6 F.C.C. at 574.

[21] *Southwestern Bell Tel. Co.*, 6 F.C.C. at 532.

time, the Commission has also stated that: "Section 214 is not confined to the 'extension' of a line -- which might reasonably be construed as requiring some part of the common carrier facilities to cross a state boundary -- but includes the 'construction of a new line' even though wholly within a single [s]tate so long as it is part of an interstate 'channel of communication' or 'line.'"[22]

13. In the international context, in granting certain Section 214 authorizations, the Commission staff has cautioned that "should [the carrier] obtain any interest in facilities beyond the authorized international points for the purpose of providing common carrier services, including private line service, between the U.S. and other international points, such action would constitute an extension of lines under Section 214."[23] We recently indicated, however, that we would not be bound by this view and provided the following preliminary guidance with respect to the expansion of service into a new international market: "When we grant a carrier initial authority to acquire and operate facilities to a particular country, we do not grant that carrier authority for an 'extension of lines' within the meaning of Section 214 . . . but instead grant that carrier authority to acquire and operate new lines to a particular geographic market."[24] Thus, in the international context, we have suggested that lines that allow a carrier to serve new international markets should be considered "new lines."[25]

14. *(2) Capacity Considerations.* Carriers can create new channels of communication, not only by expanding into new territory, but also by increasing the capabilities of their existing networks. Such increases may result from the laying of lines between points the carrier serves to supplement or supplant existing lines or from the use of technologically advanced electronic multiplexing, switching, coding, or similar central office or network equipment to allow a carrier to derive additional channels of communication from its existing facilities.

15. The Commission has consistently held that increases in capacity by either method create channels of communication requiring Section 214 authorization; however, the Commission has not clearly or consistently stated whether these channels should be

---

[22] *General Tel. Co. of California*, 13 F.C.C.2d 448, 457 (1968), *aff'd*, 413 F.2d 390 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1969).

[23] *E.g. Data General Telecommunications, Inc.*, 9 FCC Rcd 1724, 1724 n.2 (Com. Car. Bur. 1994).

[24] *Streamlining the Int'l Section 214 Authorization Process and Tariff Requirements*, IB Docket No. 95-118, Report and Order, 11 FCC Rcd 12884, 12888-89 (1996) ("*International Section 214 Streamlining Order*") (Federal Register Summary published at 61 Fed. Reg. 15724 (1996)).

[25] *Id.*

considered "new lines" or "extensions."[26]

16. The Commission has suggested that in-region lines installed to supplement existing ones constitute "new lines."[27] However, when it first considered the issue of in-region increases in capacity, the Commission stated that, in enacting Section 214, "there was no intention on the part of Congress to limit the right of carriers to make full use of their own physical facilities by the derivation of as many circuits thereon or therefrom as possible. Therefore, it is not our opinion that Section 214 requires a certificate of convenience and necessity when a company of the Bell System rearranges its circuits or derives new circuits so as to make maximum use of its existing facilities, when the result is not an extension of a particular company's service into fields not theretofore served by it."[28] Therefore, the Commission did not require Section 214 certification for such projects until after Congress amended Section 214 in 1943 to define a line as "any channel of communication . . . ."[29]

17. In light of the 1943 amendment, the Commission held that channels produced through the use of electronic equipment in conjunction with a pre-existing wire pair were "lines" within the meaning of Section 214.[30] The Commission did not, however, indicate

---

[26] *American Tel. and Tel. Co.*, 10 F.C.C. at 320.

[27] *Southwestern Bell Tel. Co.*, 6 F.C.C. at 532. As used in this notice, the term "in-region" is used to denote lines: (1) with respect to a BOC, within any in-region state, as defined in Section 271(i)(1), or within any other area where the BOC is offering local, exchange or long-distance services; or (2) with respect to other telecommunications carriers, within any geographic area where the carrier is offering either local, exchange or long distance services.

[28] *Mackay*, 6 F.C.C. at 573. The *Mackay* opinion, no longer followed by the Commission, is consistent with current practice under the Interstate Commerce Act. Interpreting 49 U.S.C. § 10901, the section of the Interstate Commerce Act corresponding to Section 214, the Interstate Commerce Commission (now the Surface Transportation Board) recently stated:

> Many carrier improvements to their existing system lie outside our jurisdiction. For example, carriers have expanded single-track lines to double-track lines by building a new track parallel to the existing one. These projects are often extensive and require substantial capital investment. They may have a profound effect on the carriers undertaking them, their customers and their competitors. But we do not take jurisdiction over them. Double-tracking is an improvement to an existing rail line. It is neither an extension of the line nor a construction of an additional one.

City of Detroit v. Canadian Nat'l Ry. Co., 9 I.C.C.2d 1208, 1218-19 (1993), *aff'd sub nom. Detroit/Wayne County Port Auth. v. I.C.C.*, 59 F.3d 1314 (D.C. Cir. 1995).

[29] 57 Stat. 11 (1943).

[30] *American Tel. and Tel. Co.*, 10 F.C.C. 315, 320 (1944).

whether these lines were "new" lines or "extensions."

18. Noting that carriers are required to obtain Section 214 certification before installing multiplexing equipment, the Commission more recently stated that such equipment creates "new `lines' or channels under Section 214."[31] Consistent with that holding, the Commission rejected a tariff filed by AT&T for Bell Packet Switching Service ("BPSS") based on the fact that AT&T had not obtained Section 214 authority to install the required equipment. The Commission stated that "the BPSS processor and interface facilities together perform multiplex operations that effectively establish new or additional channels of communication."[32] Although both of these opinions specifically use the term "new lines" to describe channels of communication created electronically, we find little evidence to suggest that the Commission deliberately chose that term with the intent to distinguish such lines from "extensions."

19. Recent Commission precedent, also, fails to indicate whether activities that increase the capabilities of a carrier's in-region network create "new" lines or "extensions." With respect to carrier installation of facilities for the provision of video dialtone ("VDT"), the Commission stated that, "an upgrade of . . . facilities to offer video dialtone service constitutes the establishment or extension of a line . . . ."[33] Although the Commission continued its discussion by stating that "[b]y constructing video dialtone platforms, LECs will be installing new systems and laying fiber to create new channels of communication,"[34] the Commission did not indicate clearly that it had consciously distinguished between "new" lines and "extensions" in characterizing VDT facilities.

20. With respect to international service, increases in a carrier's capacity to serve a given country would be considered "lines" under the Commission's interpretation of Section 214 since 1943.[35] The Commission, however, did not assert its Section 214 jurisdiction over international lines created by electronically increasing the capacity of existing facilitites until 1964. That year, the Commission stated:

---

[31] *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261, 312 (1976).

[32] *American Tel. and Tel. Co.*, 91 F.C.C.2d 1, 13-14 (1982).

[33] *Television Company -- Cable Television Cross Ownership Rules, Sections 63.54 - 63.58*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 310 (1994).

[34] *Id.*

[35] *American Tel. and Tel. Co.*, 10 F.C.C. at 320.

> AT&T, and the various record carriers, have increased the capacity of, or the number of messages (voice and record) handled, by their respective facilities by the use of appropriate equipment; *e.g.* the use of Time Assignment Speech Interpolation ("TASI") equipment by AT&T. To date, we have not exercised the authority given us pursuant to the provisions of Section 214 . . . to require the filing and a grant of appropriate applications before installation of such equipment. We feel, however, that, in view of the rapid growth of facilities in this field, the imminence of satellite communications, and the vast increase in facilities possible through heretofore unregulated installations, we should require such an application, and a grant thereof before the installation of such equipment.[36]

The Commission went on to impose suitable conditions on the grant of the application at issue. The Commission did not, however, provide clear guidance as to whether it considered increases such as these to be "new lines" or "extensions," or whether it made any principled distinction between channels created electronically and channels created by constructing wholly separate, parallel facilities.

3. Discussion

21. After reviewing the legislative intent of Congress, and Commission and court precedent, we find that, to date, the Commission has not clearly defined "extension of any line" for purposes of Section 214. We, therefore, take this opportunity to seek comment on an appropriate definition. We tentatively conclude that an "extension of a line" is a line that allows the carrier to expand its service into geographic territory that it is eligible to serve, but that its network does not currently reach.[37] With respect to projects that increase the capabilities of a carrier's existing network within an area it already serves, we tentatively conclude, based on a review of Commission precedent, that we should consider the resulting additional channels of communication to be "new lines." We seek comment on this tentative conclusion, including comment on whether such upgrades should be treated instead as "extensions."

22. Alternately, we seek comment on whether, consistent with the Surface Transportation Board's treatment of "double-tracking" of rail lines,[38] we should treat in-region

[36] *American Tel. and Tel. Co.*, 37 F.C.C. 1151, 1158 (1964).

[37] This definition is consistent with Section 63.02 of our rules, 47 C.F.R. § 63.02, entitled, "Special provisions relating to extensions involving small projects." Section 63.02 uses a definition similar to the one we propose here inasmuch as it applies to "extension of service into domestic territory at present not directly served by the applicant."

[38] *See* note 28, *supra*.

increases in network capacity as "improvements," outside the scope of Section 214. We seek specific comment on whether such treatment would be: (1) consistent with the statutory definition of a line as "any channel of communication"; and (2) appropriate in light of the original intent of Section 214 to inhibit network "gold-plating" and the intent of the 1996 Act to promote competition by removing outdated barriers to entry in telecommunications markets.

23. *Extension Within the United States:* The definition of extension we have proposed exempts carriers from their obligation to obtain Section 214 authorization for expansions into additional domestic territory that they are otherwise eligible to serve.[39] By relieving carriers of the burden of obtaining Section 214 approval for such projects, the definition would encourage carriers to expand their service areas into territory served by other carriers. We tentatively conclude that this definition would be consistent with the natural meaning of "extend," as well as court and Commission precedent because it would exempt from Section 214 certification lines that "expand the area or scope of" a carrier's network. In addition, by exempting carriers' efforts to expand their facilities or services beyond the areas in which they are currently providing service, we believe that we would encourage the development of competition, consistent with the 1996 Act.

24. Consistent with the original purpose underlying Section 214, under our proposed definition, the Commission would retain jurisdiction over the construction of most in-region facilities. These projects take place within the area where there is the potential danger that a dominant carrier will create needlessly duplicative facilities, the cost of which may be borne by captive telephone ratepayers. These potential dangers are especially great in the case of a LEC subject to rate-of-return regulation, which would be in a position to recover the cost of additional, unnecessary facilities from its ratepayers. We note, however, that our proposed definition would allow even a rate-of-return LEC to extend lines into additional geographic territory without specific Section 214 certification. We tentatively conclude that our existing accounting and cost allocation rules would help protect such a LEC's captive ratepayers from bearing the cost of such extensions, even if the LEC sought to build unneeded, out-of-region facilities.[40] We request comment on this tentative conclusion.

---

[39] Under the definition we propose, a carrier may be "eligible" to serve certain territory without any actual "authorization" to serve it. In such a case, although a carrier might need to obtain specific regulatory authorizations under the Communications Act before initiating service to given territory, *see, e.g.*, 47 U.S.C. §§ 271-72 in the domestic context, it would nevertheless be "eligible" to serve that territory for purposes of Section 402(b)(2)(A) of the 1996 Act. *See* paragraph 25, *infra*. In the international context, carriers are eligible to serve only those countries for which they have received specific Section 214 authorizations. *See* paragraphs 30-34, *infra*.

[40] 47 C.F.R. Parts 32 and 64. The Commission is reviewing the methods incumbent local exchange carriers use to allocate network plant costs used to provide both regulated telecommunications services and nonregulated services, including nonregulated video programming services. *Allocation of Costs Associated with Local*

25. Under our proposed definition, a carrier would be able to extend its lines only into additional domestic territory that it is eligible to serve under the Communications Act, as amended, and the Commission's rules and policies. In this respect, we note that most LECs (*i.e.*, all except the BOCs and GTE) were eligible to immediately provide interstate, interexchange services, consistent with the policies stated in the *Competitive Carrier Proceeding*, even before the 1996 Act became law.[41] Under the 1996 Act, the Bell Operating Companies ("BOCs") are authorized to provide out-of-region, interLATA service, and are eligible to provide in-region, interLATA service once they comply with the requirements imposed by new Sections 271 and 272.[42] In addition, the 1996 Act replaced the GTE Consent Decree, which barred GTE from providing domestic, interstate, interexchange services; GTE may now do so consistent with the requirements of the Communications Act, as amended, and the Commission's rules and policies. Furthermore, all domestic carriers are eligible to provide exchange telephone service on a competitive basis. Some carriers are already providing such competitive local exchange service, and others may soon begin to do so, either on a facilities or resale basis.[43] Congress intended the 1996 Act to encourage such competitive activities and we believe that the elimination of carriers' Section 214 obligations will further that intent.[44] We tentatively conclude, therefore, that a domestic carrier wishing to serve new territory may extend its lines to do so without obtaining Section 214 authority, as long as the carrier obtains any other regulatory approvals that may still be required.

26. We recognize that this proposed definition of "extension" may produce some anomalous results. For example, a domestic IXC that does not currently have facilities that serve the entire geographic United States would be able to extend lines into additional

---

Exchange Carrier Provision of Video Programming Services, Notice of Proposed Rulemaking, 11 FCC Rcd 17211 (1996).

[41] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fifth Report and Order, 98 F.C.C.2d 1191, 1198 (1984) ("*Competitive Carrier Fifth Report*").

[42] Section 104 of the 1996 Act adds new Sections 271 and 272 to the Communications Act of 1934, which governs the provision if interLATA service by the BOCs. 47 U.S.C. §§ 271-272. In general, the BOCs must apply to the Commission for authority to offer in-region interLATA service under Section 271(d)(3). These sections of the Communications Act will be addressed in a separate rulemaking proceeding.

[43] *See Common Carrier Competition*, Spring 1996, Report No. CC 96-9, at 3 (rel. Apr. 10, 1996).

[44] Because a carrier facing competition cannot rationally build excessively or raise rates above the competitive level, Section 214 regulation of such carriers for these purposes will not serve the intent of Section 214. At the same time, by eliminating the significant regulatory burden imposed by Section 214, we will facilitate entry into the markets for these services.

territory consistent with the policies developed in the *Competitive Carrier* proceeding.[45] However, an IXC that already serves the entire domestic United States with its own facilities would not be permitted, under our proposed definition, to extend its lines without obtaining Section 214 approval. We note, however, that there should be no substantial or practical impact on the domestic IXCs because, as discussed more fully below, we tentatively conclude that we should forbear from applying Section 214 and our Part 63 rules to non-dominant IXCs under Section 401 of the 1996 Act.[46] We believe our proposed definition would create fewer anomalies overall than other possible definitions. In addition, we are confident that we will be able to correct such results through the exercise of our forbearance authority.

27. Under our tentative definition, once a carrier has expanded into new territory by "extending" its lines, additional activities within that territory seemingly would create "new" lines. In the *Competitive Carrier* proceeding, we determined that LECs could offer interstate, interexchange services on a non-dominant basis through an affiliate that met certain separation requirements; a LEC offering such services directly, by contrast, would be regulated as dominant.[47] We recently extended this regulatory regime, on a temporary basis, to BOC provision of out-of-region, interLATA telecommunications services to provide interim protection from potential cost-shifting and anticompetitive conduct by the BOCs.[48] While we have recently sought comment on whether it might be appropriate at some future date to modify or eliminate the separation requirements thus imposed, those requirements remain in place.[49] In this proceeding, while we propose forbearance from Section 214 regulation for most LECs and all non-dominant carriers, as discussed below, we also propose that rate-of-return LECs remain subject to streamlined Section 214 regulation. Accordingly, rate-of-return LECs might find themselves subject to Section 214 certification requirements only for their second and subsequent lines into a given territory. We seek specific comment on these and other potential anomalies, including possible remedies.

---

[45] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Third Report and Order, 48 Fed. Reg 46791, 46792 (1983) ("*Competitive Carrier Third Report*").

[46] Section 401 added a new Section 10 to the Communications Act of 1934, codified at 47 U.S.C. § 160.

[47] *Competitive Carrier Fifth Report*, 98 F.C.C.2d at 1198.

[48] *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21, Report and Order, FCC 96-288, ¶¶ 19-25 (rel. July 1, 1996) (extending *Competitive Carrier* separation requirements on an interim basis to BOC provision of out-of-region interLATA and intraLATA services); *see also Policy and Rules Concerning the Interstate, Interexchange Marketplace; and Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Notice of Proposed Rulemaking, 11 FCC Rcd 7141, 7171-75 (1996) ("*Interexchange NPRM*").

[49] *Interexchange NPRM*, 11 FCC Rcd at 7174.

28. Accordingly, we ask parties to comment on whether our proposed definition of line "extensions," as it applies to all common carriers, whether they are IXCs, LECs, resellers, international carriers (discussed below), or others, satisfies the goals of Section 402(b)(2)(A). We seek specific discussion of our proposed definition's impact on particular projects subject to Section 214 regulation or the Section 402(b)(2)(A) exemption. In addition, commenters advocating revisions to our definition should propose specific language and discuss the basis for their proposals in light of the dictionary meanings, legislative history, and precedents discussed above.

29. Our proposed definition would exclude all carrier lines in areas within which the carrier is currently providing service. Accordingly, under our tentative conclusion in paragraph 21, above, channels of communication derived from in-region network upgrades would be treated as "new lines." Such treatment would be consistent with past Commission characterizations of such lines.[50] Furthermore, it would preserve the Commission's Section 214 authority with respect to in-region network upgrades by dominant carriers. In-region network upgrades by dominant carriers present the greatest opportunities to duplicate facilities unnecessarily, with consequently higher charges to ratepayers. Although we expect the development of competition to lessen those opportunities, we tentatively conclude that, currently, continued Commission regulation of such projects remains consistent with the goals of Section 214. As with the IXCs, however, we tentatively conclude that the full exercise of this authority is not necessary to protect ratepayers in every instance. Specifically, as discussed more fully below, we tentatively conclude that we should forbear from regulating the in-region activities of LECs that are subject to price cap regulation ("price cap carriers"),[51] LECs that are considered average schedule companies,[52] and competitive access providers ("CAPs").

30. *International Lines:* We have provided preliminary guidance with respect to the definition of a line "extension" in the international context by stating, with respect to Section 402(b)(2)(A), that:

> We do not view this provision as applicable to our authority to require common carriers to obtain Section 214 authority to acquire, operate, or resell facilities or services to serve individual countries. When we grant a carrier initial authority to acquire and operate facilities to a particular country, we do not grant that carrier authority for an "extension of lines" within the meaning of Section

[50] *See* cases cited at notes 26 - 34, *supra.*

[51] The price cap rules are codified at Sections 61.41-61.49 of the Commission's rules, 47 C.F.R. §§ 61.41-61.49. *See also* Section 61.1(c), 47 C.F.R. § 61.1(c).

[52] The provisions governing the rate regulation procedures applied to average schedule companies are codified at Section 69.606 of the Commission's rules, 47 C.F.R. § 69.606.

214 . . . but instead grant that carrier authority to acquire and operate new lines to a particular geographic market.[53]

31. Because the initiation of service to a new foreign point raises an array of issues not associated with the expansion of service within the domestic United States, we tentatively conclude that such initiation of service involves the construction, acquisition, or operation of "new lines." This definition would be consistent with the meaning of "new," which, in contrast to an "extension," implies something "unfamiliar" or "novel."[54] We seek comment on this tentative conclusion.

32. Within the international context, we have stated that "the international geographic market exists in terms of separate and distinct areas determined by national borders."[55] Therefore, we tentatively conclude that the initiation of service to a new country is an action fundamentally different in character from the extension of facilities domestically, where carriers have much greater economic and operational flexibility.[56] Carrier initiation of international service raises legal, economic, policy, and facility-specific issues different from those raised by the provision of domestic service.[57] The Commission, for example, recently adopted a route-by-route approach to reviewing foreign carrier Section 214 applications to provide international services. Where a foreign carrier holds market power in a proposed destination market, the Commission examines whether effective competitive opportunities exist for U.S. carriers in that market. This allows us to address the potential anticompetitive effects of permitting a foreign carrier to provide U.S. telecommunications services between the United States and a country where it has market power.[58] The legal, economic, policy, and facility-specific issues involved in service to particular foreign points require individual consideration, as well as consultation with the Executive Branch.

33. Accordingly, when we grant a carrier authority to acquire and operate facilities to a particular country, we tentatively conclude that we do not grant that carrier authority to "extend" lines within the meaning of Section 214 and Section 402(b)(2)(A), but instead grant

---

[53] *International Section 214 Streamlining Order*, 11 FCC Rcd at 12888-89.

[54] *See* text at note 13, *supra*.

[55] *International Competitive Carrier Policies*, Report and Order, 102 F.C.C.2d 812, 829 (1985) ("*International Competitive Carrier*").

[56] *See International Competitive Carrier*, 102 F.C.C.2d at 829.

[57] *See generally Market Entry and Regulation of Foreign-Affiliated Carriers*, Report and Order, 11 FCC Rcd 3873 (1995) ("*Foreign Carrier Entry Order*"); *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331 (1992); *International Competitive Carrier*, 102 F.C.C.2d 812.

[58] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3884-88.

that carrier authority to acquire and operate new lines. International carriers are not eligible to initiate service to new international points until they receive specific Section 214 authorization to do so.[59] We tentatively conclude, therefore, that few carrier activities involving the provision of international services can properly be considered line "extensions" within the meaning of Section 214 or Section 402(b)(2)(A).[60] Accordingly, under our proposed definition, virtually all international lines must be classified as "new." We seek comment on this tentative conclusion.

34. Our proposed definition also would exclude projects that increase a carrier's capacity to carry traffic between the United States and another country it already serves. Such projects do not involve the expansion of service into any new geographic territory. Accordingly, we tentatively conclude that such capacity increases constitute "new" lines subject to Section 214 regulation, consistent with our characterization of domestic carrier in-region network upgrades. Nevertheless, we seek specific comment on the impact of our decision on all international carrier projects.

35. *Other Options:* We have tentatively concluded that an "extension" of a carrier's line should be defined as a line that allows the carrier to expand its service into geographic territory that it is eligible to serve, but that its network does not currently reach. We seek comment, however, on other alternatives, such as defining "extension of any line" to include:

(i) any line, some part of which crosses a state boundary, consistent with the language of *General Tel. Co. of California*.[61] Lines that are wholly within a single state, but that nevertheless form part of an interstate channel of communication would be excluded from this definition.

(ii) any augmentation of lines in a carrier's network, heretofore subject to Section 214 certification, without distinguishing "new" lines from "extensions." Such a definition would be consistent with the Commission's historic treatment of "new" lines and "extensions" as one uniform group, without subdivision. Under such a definition, the Commission would exempt all additions to a carrier's network from the requirements

[59] *Cf. Streamlining the International Section 214 Authorization Process and Tariff Requirements*, Notice of Proposed Rulemaking, 10 FCC Rcd 13477, 13484 (1995) (carriers may provide service on a switched transit basis through intermediate countries which they are authorized to serve on a direct facilities basis regardless of whether they have specific authority to serve the terminal country, provided their certificate for the intermediate country does not prohibit such routing).

[60] One exception we can identify at this time would arise when a U.S. carrier obtains an interest in facilities within a foreign country in order to extend its U.S. international half-circuits to reach new territory within that foreign country.

[61] *Supra*, note 22.

of Section 214. Such a definition would subject to Section 214 review only discontinuance, reduction, or impairment of service.

(iii) any channel of communication that is not created with a physically new facility. Under such a definition, capacity increases in existing facilities would be considered extensions, while the installation of physically new lines would remain subject to Section 214 certification. Such a definition potentially could influence carrier business decisions, because physically new facilities would be subject to a greater regulatory burden than capacity increases in existing facilities.

(iv) any line that connects to a carrier's network. Such a definition would include any line that augments a carrier's facilities by connecting to them. It would exclude augmentations that do not directly connect to the carrier's existing lines, as well as any discontinuance, reduction, or impairment of service.

We seek comment on these alternatives and on whether another definition would better address the considerations apparent in the language of Sections 214 and Section 402(b)(2)(A), the legislative history, and judicial and Commission precedents.

36. We note that carrier activities constituting the "extension" of a line, as defined in the course of this proceeding, are exempt from the requirements of Section 214 as of the date of enactment of the 1996 Act, February 8, 1996.

B. Section 214 Requirements for Price Cap Carriers, Average Schedule Carriers, and Domestic, Non-dominant Carriers

37. Under the definition of line "extension" proposed above, Section 402(b)(2)(A) of the 1996 Act preserves the Commission's Section 214 authority over telecommunications carriers seeking to construct, acquire, or operate new lines of communication, or engage in transmission over such lines. Consistent with the forbearance authority granted the Commission in Section 401 of the 1996 Act,[62] however, and for the reasons stated herein, we propose in this notice to forbear from applying all Section 214 authorization requirements to LECs subject to price cap regulation ("price cap carriers"),[63] to LECs that are average schedule companies,[64] and to all domestic carriers classified as non-dominant, whether they are offering local or long distance services. Accordingly, we tentatively conclude that these

[62] 47 U.S.C. § 160.

[63] The price cap rules are codified at Sections 61.41-61.49 of the Commission's rules, 47 C.F.R. §§ 61.41-61.49. *See also* Section 61.1(c), 47 C.F.R. § 61.1(c).

[64] The provisions governing the rate regulation procedures applied to average schedule companies are codified at Section 69.606 of the Commission's rules, 47 C.F.R. § 69.606.

carriers should no longer be required to obtain Section 214 authorization for the construction, acquisition, or operation of new lines between domestic points, or for transmission over such lines. In light of this proposal, we tentatively conclude that Section 63.07 of our rules[65] should be repealed.

38. Section 401 amends Title I of the Communications Act of 1934 by adding a new Section 10.[66] Section 10(a) directs the Commission to forbear from enforcing a regulation or provision of the Communications Act when: (1) enforcement is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with a carrier or service are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. Section 10(b) further instructs the Commission to consider whether forbearance will promote competitive market conditions and enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may provide the basis for the Commission's finding, pursuant to subsection 10(a)(3), that forbearance is in the public interest.

39. We tentatively conclude that, under the first prong of the three-part forbearance analysis set forth in Section 10(a), the imposition of Section 214 authorization requirements on price cap, average schedule, and non-dominant carriers is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with these carriers or their services are just, reasonable and not unreasonably discriminatory. This tentative conclusion is based primarily on the presumption that price cap and average schedule carriers, by virtue of the rate regulation schemes applied to each, are constrained in their ability to raise interstate telephone service rates. Non-dominant carriers, by virtue of facing competition in their service areas also are constrained in their ability to raise rates.

40. Price cap carriers are limited in their ability to realize a regulatory benefit from overinvesting in facilities because rates for interstate services are capped in accordance with preset formulas that account for inflation and productivity growth. By capping prices rather than carrier profits, price cap regulation discourages overinvestment in facilities and encourages carriers to lower costs and increase productivity. We recognize that, under the Commission's current price cap regulations, carriers may elect a "sharing" option, which could

[65] Section 63.07(a) of our rules currently provides that "[a]ny party that would be a non-dominant domestic interstate communications carrier is authorized to provide domestic, interstate services to any domestic point and to construct, acquire, or operate any transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies." 47 C.F.R. § 63.07(a).

[66] 47 U.S.C. § 160.

affect the rates charged for interstate services.[67] In general, under our current interim LEC price cap rules, a BOC could select an X-factor option that requires it to share interstate earnings with its customers that exceed specified benchmarks and permits the BOC to make a low-end adjustment if interstate earnings fall below a specified floor.[68] Therefore, price cap regulation of a monopoly carrier that has elected a sharing option may not eliminate entirely that carrier's incentive to invest in unnecessary facilities. Such "gold-plating" activities may have the potential to increase the carrier's costs and, therefore, to reduce the carrier's obligation to share its regulated profits with its customers.[69]

41. Although price-cap regulation that includes a sharing option preserves some of the incentives toward "gold-plating" that accompany rate-of-return regulation, we believe that all forms of price cap regulation nevertheless reduce these incentives. Price cap carriers incur sharing obligations on a sliding scale once their profits exceed certain levels; only when the carrier enters its "100% sharing" zone would it reap the full benefit of an increase in its costs. Virtually all of the price-cap carriers have adopted the "no-sharing" X-factor.[70] This fact seems to indicate strongly that, in general, the benefits associated with the no-sharing option exceed the benefits of adopting a sharing option and strategically overinvesting in facilities. Moreover, we expect that growth in competition for local exchange and interstate access will provide additional incentives for the price-cap LECs to increase their efficiency. Therefore, whether a price cap carrier elects a "sharing" or "no sharing" option, we tentatively conclude that additional regulation under Section 214 is not required to protect telephone service ratepayers adequately against potentially higher rates resulting from investment in unnecessary facilities. Accordingly, we tentatively conclude that "sharing" and "no sharing" price cap carriers should be treated alike for purposes of applying forbearance from the Section 214 authorization requirements. We seek comment on this tentative conclusion, and request that commenters address whether we should distinguish price cap carriers that have elected an X-factor with no sharing requirement from other price cap carriers. We seek specific comment on whether we should apply the streamlined Section 214 procedures that we propose for rate-of-return carriers to price cap carriers that have a sharing obligation.

42. Similarly, average schedule companies are compensated for interstate telephone

---

[67] *See Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 10 FCC Rcd 8961, 9055-57 (1995).

[68] *Id.* at 9035-36.

[69] Similarly, the possibility of future re-calibration of price cap levels also implies that price cap regulation does not fully sever the link between regulated costs and prices.

[70] Of the price-cap carriers, only U S WEST, the Southern New England Telephone Company, Citizens Utilities Company, and certain parts of GTE have adopted a sharing X-factor. *See, e.g., 1996 Annual Access Tariff Filings*, 11 FCC Rcd 7564, 7584 (1996).

services through access service rates developed by the National Exchange Carrier Association ("NECA") on the basis of industry-wide averages.[71] This constraint on the ability of average schedule carriers to raise interstate telephone service rates reduces the incentive that these carriers otherwise might have to overinvest in facilities. Accordingly, we tentatively conclude that the first prong of the Section 10 forbearance test is satisfied for carriers that are average schedule companies.

43. In the *Competitive Carrier* proceeding,[72] the Commission granted blanket Section 214 authority to non-dominant domestic carriers based on its finding that, in a competitive environment, market forces could protect the public from unreasonably high rates and undue discrimination.[73] More recently, the Commission has reaffirmed its view that marketplace forces can replace regulation and make burdensome regulatory requirements unnecessary for

---

[71] Average schedule companies receive compensation for interstate common carrier services on the basis of formulas that are designed to simulate the disbursements that would be received by a cost company that is representative of average schedule companies. Average schedule formulas compensate exchange carriers on the basis of the number of their access lines, minutes of use of their central office switches, and other non-cost characteristics. The formulas are based on sampled data from average schedule companies and from completed cost studies of cost companies that are representative of average schedule companies. *See* 47 C.F.R. § 69.606.

[72] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 F.C.C.2d 1 (1980) ("*Competitive Carrier First Report*"); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Second Report and Order, 91 F.C.C.2d 59, 71-73 (1982) ("*Competitive Carrier Second Report*");("*Competitive Carrier Third Report*, 48 Fed. Reg 46791 (1983); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 F.C.C.2d 554 (1983) ("*Competitive Carrier Fourth Report*"), *vacated sub nom. American Tel. and Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191; *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Sixth Report and Order, 99 F.C.C.2d 1020 (1985) ("*Competitive Carrier Sixth Report*"), *vacated sub nom. MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

[73] In revising Section 63.07 of the Commission's rules in 1984, the Commission "authorized" any non-dominant domestic interstate carrier to construct, acquire, or operate any transmission line so long as it obtained the necessary authorizations from the Commission for use of radio frequencies. *Competitive Carrier Fifth Report*, 98 F.C.C.2d at 1192. On occasion, this action has been referred to by the Commission as "blanket" or "automatic" authorization. *E.g., Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd at 3280. Although certain Court decisions have held that the Commission heretofore had no implicit forbearance authority, *e.g., MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d 1186, 1192-95 (D.C. Cir. 1985), Congress granted the Commission express forbearance authority in Section 401 of the 1996 Act. Accordingly, in this notice, except with respect to the limited grant of authority to rate-of-return LECs discussed below, we do not propose to rely on "blanket" or "automatic" authorizations, to the extent that those terms imply the affirmative grant of Section 214 authority to a particular class of carriers, but instead propose express forbearance from enforcing the Section 214 mandates.

both carriers and the Commission.[74] Based on our continuing belief that market forces limit the ability of non-dominant carriers to recover the cost of unnecessary facilities from telephone service ratepayers, we propose to forbear from applying the Section 214 authorization requirements to all domestic facilities of domestic non-dominant carriers. Such forbearance would be consistent with our decision, under the forbearance provisions of the 1996 Act, no longer to require or to allow nondominant interexchange carriers to file tariffs for their interstate, domestic, interexchange services.[75]

44. As discussed above, Section 214 review was intended to protect against duplicative and wasteful investments that could harm telephone service ratepayers. Our concern is that interstate telephone ratepayers not pay for such investments through increased rates for telephone service, particularly when carriers' rates are based on their costs plus a reasonable rate-of-return above those costs. Accordingly, our tentative finding that price cap, average schedule, and non-dominant carriers need not be required to obtain Section 214 authorizations is consistent with the rationale for Section 214 review. Specific Section 214 review of these carriers' investments in facilities is not necessary to ensure that their charges are just and reasonable because competitive forces or other regulatory constraints on prices already ensure that these classes of carriers have little economic incentive or ability to invest in wasteful or duplicative facilities.

45. We also tentatively conclude that, under the first prong of the Section 10(a) forbearance analysis, the imposition of Section 214 authorization requirements on price cap, average schedule, and domestic non-dominant carriers is not necessary to prevent those carriers from engaging in anticompetitive or discriminatory practices. The Section 214 certification process is not designed to prevent such abusive practices and, furthermore, the Commission has in place rules specifically addressing anticompetitive and discriminatory

---

[74] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd at 3285.

[75] *Policy and Rules Concerning the Interstate, Interexchange Marketplace and Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report and Order, FCC 96-424, ¶ 77 (rel. Oct. 31. 1996) ("*Tariff Forbearance Order*"). Our action in the *Tariff Forbearance Order* was consistent with our findings in the *Competitive Carrier Proceeding*, up to 15 years ago, that neither mandatory nor permissive tariff filing by nondominant, domestic IXCs was necessary to prevent such carriers from charging unjust and unreasonable rates or making service unavailable. The Commission instead concluded that market forces, together with the Section 208 complaint process and the Commission's ability to reimpose tariff-filing and facilities-authorization requirements, were sufficient to protect the public interest with respect to nondominant interexchange carriers subject to forbearance. The Commission also noted that firms lacking market power could not charge unlawful rates because customers could always turn to competitors. *See Competitive Carrier Second Report*, 91 F.C.C.2d at 73; *Competitive Carrier Fourth Report*, 95 F.C.C.2d at 578; *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191; *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020 (replacing the policy of permissive detariffing with one of mandatory detariffing).

practices.[76] We retain the ability to reimpose Section 214 requirements should it become necessary to ensure that carrier rates and practices are just, reasonable, and nondiscriminatory.

46. We tentatively conclude that, under the second prong of the Section 10(a) forbearance analysis, imposition of the Section 214 authorization requirements on price cap (sharing and non-sharing), average schedule, and domestic non-dominant carriers is not necessary to protect consumers. Section 214 was originally enacted to protect telephone ratepayers. The rate regulation scheme applied to price cap and average schedule carriers, and market forces acting on domestic nondominant carriers, however, minimize the risk that telephone ratepayers will pay for wasteful investments by these carriers. We also tentatively find that forbearance from imposing Section 214 authorization requirements will benefit consumers because it will reduce the regulatory costs and delay currently imposed on carriers seeking to introduce new services. Accordingly, forbearance treatment should promote the ability of carriers to satisfy consumer demands more efficiently and at lower rates.

47. We also seek comment on whether there are other factors, apart from rate-of-return regulation or sharing obligations, that may affect the potential for duplicative and wasteful investments. In particular, we seek comment on the extent to which the rules and policies advocated by LECs in the appeal of our interconnection order[77] and in the universal service[78] proceeding could affect the incentives of carriers to make investments that are inconsistent with the statutory objective(s) of Section 214.

48. We tentatively conclude that, under the final prong of the Section 10(a) forbearance analysis, forbearance is in the public interest because it will promote competitive market conditions and enhance competition among providers of telecommunications services. The Commission's Section 214 review process currently appears to impose regulatory barriers to the entry of new carriers and the creation or expansion of facilities by all carriers because carriers proposing projects that do not fall within one of the Commission's blanket authority rules must engage in a potentially lengthy Commission review of their proposals and disclose potentially competitively sensitive information to rivals. By reducing the regulatory burden

[76] *See, e.g.*, 47 C.F.R. Parts 32, 61 and 64.

[77] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), *motion for stay of the FCC's rules pending judicial review denied, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Order, FCC 96-378 (rel. Sep. 17, 1996), *partial stay granted sub nom. Iowa Utils. Board v. F.C.C.*, No. 96-3321, 1996 WL 589204 (8th Cir. Oct. 15, 1996); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, FCC 96-333 (rel. Aug. 8, 1996).

[78] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 96J-3 (Jt. Bd. rel. Nov. 8, 1996) ("*Universal Service Recommended Decision*").

imposed by Section 214, we would encourage the development of competition by facilitating market-driven network expansion and reducing the costs of obtaining regulatory approval. Accordingly, we tentatively conclude that forbearance from applying the Section 214 authorization requirements to price cap, average schedule, and domestic non-dominant carriers would stimulate competition by facilitating entry of new carriers, price decreases, and improved offerings. Accordingly, we tentatively conclude, pursuant to Sections 10(a)(3) and 10(b), that the forbearance policy proposed herein is in the public interest.

49. We seek comment on the forbearance policy proposed above. We also seek comment on the advantages and disadvantages of alternative reform proposals including, for example, streamlining our Section 214 application procedures with respect to one or more of these classes of carriers instead of forbearing from applying the Section 214 authorization requirements. In addition, we seek comment on any procedures which may be necessary with respect to Section 214 in the event a carrier subject to forbearance treatment changes its cost accounting method and, as a result, no longer falls within a forborne class of carriers.

50. In the *Competitive Carrier* proceeding, the Commission found, for purposes of assessing the market power of interexchange carriers covered by that proceeding, that: "(1) interstate, domestic, interexchange telecommunications services comprise the relevant product market, and (2) the United States (including Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points) comprises the relevant geographic market for this product, with no relevant submarkets."[79]

51. The Commission recently tentatively concluded that, under certain circumstances, narrower market definitions may provide a more refined analytical tool for assessing market power.[80] Specifically, its tentative conclusions were: (1) to define as a "relevant product market an interstate, interexchange service for which there are no close substitutes or a group of services that are close substitutes for each other but for which there are no other close substitutes";[81] and (2) to define the "relevant geographic market for interstate, interexchange

[79] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 F.C.C.2d 554, 563 (1983) (subsequent history omitted). The Commission then noted that it considered MTS/WATS, private line, and public switched record services all to be part of the same product market, as they were close demand or supply substitutes for one another. *Id.* at 563-64.

[80] *See Interexchange NPRM*, 11 FCC Rcd at 7164-71; *see also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308, ¶¶ 108-162 (rel. Jul. 18, 1996).

[81] *Interexchange NPRM*, at ¶ 41.

services as all calls (in the relevant product market) between two particular points."[82] Although the Commission proposed treating "interstate, interexchange calling generally as one national market," the Commission also proposed to examine credible evidence of market power in particular product or point-to-point markets.[83] We seek comment on how revisions to the Commission's assessment of market power in these differing contexts may affect our proposal to forbear from Section 214 regulation of nondominant carriers, if we were to adopt such revisions. In addition, we seek specific comment on the regulation under section 214 of a carrier that might be regulated as dominant in some product, geographic, or service markets, but nondominant in others.

C. Section 214 Requirements for Domestic, Dominant, Rate-of-Return Carriers

1. Streamlined Application Procedures

52. In this notice, we propose to amend Section 63.01 of our rules[84] to streamline Section 214 filing procedures for domestic carriers that we tentatively conclude should remain subject to the Section 214 authorization requirements.[85] We propose to limit this category of carriers to domestic dominant carriers that are subject to rate-of-return regulation ("dominant rate-of-return carriers"). We propose to retain a Section 214 authorization requirement for these carriers given our tentative conclusion that the rate regulation method applied to them gives them an incentive to overinvest in facilities[86] and because they lack external constraints on their ability to pass such costs on to telephone service ratepayers. As recently stated by the Commission, "[w]e are mindful of our statutory obligations under the Communications Act of 1934 to guard against abuses of market power in situations where effective competition does not yet exist. We meet these obligations through our Section 214 authorization process

[82] *Id.* at ¶ 42.

[83] *Id.*

[84] 47 C.F.R. § 63.01.

[85] The Commission recently amended Section 63.01 to restrict the applicability of that section to domestic Section 214 authorizations and created a new rule governing international authorizations. *International Section 214 Streamlining Order*, Appendix A, 11 FCC Rcd at 12923-41.

[86] *See* Harvey Averch and Leland Johnson, *Behavior of the Firm under Regulatory Constraint*, 52 AM. ECON. REV. 1052 (December 1962). As described by Averch and Johnson, under rate-of-return regulation, regulators set prices in a manner that allows firms to earn a "normal" return on their capital. Because the regulator is fixing the firm's rate of return, or rate of profits, the firm can increase profits by increasing its level of capital. Since prices of services are directly related to a firm's rate base or its total investment in capital, Averch and Johnson conclude that rate-of-return carriers possess an incentive to overinvest in capital. *Id.*

and apply dominant carrier regulation and other safeguards where circumstances warrant."[87] Since dominant rate-of-return carriers have both the incentive and the opportunity to recover the cost of duplicative or wasteful facilities directly from telephone service ratepayers, we believe that Section 214 review remains warranted for such carriers' proposals to construct, acquire, or operate new or additional domestic lines.

53. Nevertheless, we propose to amend Part 63 of our rules to reduce the burden on carriers required to file Section 214 applications. Specifically, we propose to streamline the Section 63.01 filing requirements by eliminating the filing of unnecessary information and providing for automatic approval of Section 214 applications thirty-one days after the Commission issues public notice that the application has been accepted for filing, unless (1) the Common Carrier Bureau (the "Bureau") notifies the applicant within that period that the grant will not be automatically effective; or (2) within thirty days following the issuance of public notice a party both files an opposition to the application with the Commission and serves a copy on the applicant.

54. As reflected in the attached appendix of proposed rule amendments, we propose to amend Section 63.01 to lessen the burden on carriers and to require carriers to file only the following information: (a) name and address of applicant; (b) state of incorporation of corporate applicant; (c) information identifying the officer to whom correspondence may be addressed; (d) points between which proposed facilities are to be located; (e) a brief description of the facilities to be added and of the applicant's existing facilities between these points; (f) an affidavit, executed under penalty of perjury: (1) that there is a public need for proposed facilities; and (2) that the facilities are economically justified; and (g) a statement whether authorization of facilities is categorically excluded from Section 1.1306 of the Commission's rules.[88]

55. We propose to eliminate from our current Section 63.01 filing requirements information concerning: (a) whether the carrier is or will become a carrier subject to Section 214 of the Communications Act; (b) whether the facilities will be used to extend communication services into territory at present not directly served by the applicant or to supplement existing facilities of the applicant; (c) the types of services to be provided over the proposed facilities; (d) the applicant's present and estimated future facilities requirements; (e) the map or sketch showing the proposed facilities; (f) a description of the manner and means by which other interstate and foreign communications services of a similar character are now being rendered by the applicant and others in the area to be served by the proposed

[87] *International Section 214 Streamlining Order*, 11 FCC Rcd at 12886.

[88] 47 C.F.R. § 1.1306. Section 1.1306 provides guidance with respect to the types of modifications of existing or authorized facilities or equipment for which the preparation and filing of an environmental assessment is not required.